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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 19[illegible].

No. 287

MRS. IRIS CHRISTINE BERGHOLM ET AL.,
PETITIONERS,

vs.

PEORIA LIFE INSURANCE COMPANY OF PEORIA, ILL., RESPONDENT.

PETITIONERS' SUPPLEMENTAL BRIEF, REPLYING TO RESPONDENT'S BRIEF AND MOTION TO DISMISS.

TOM CONALLY,
Counsel for Petitioners.

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PETITIONERS' SUPPLEMENTAL BRIEF, REPLYING TO RESPONDENT'S BRIEF AND MOTION TO DISMISS.

I.

Petitioners' Reply to Respondent's Contention that Existence and Continuance of Total and Permanent Disability Not Shown by "Undisputed" Evidence.

In answer to Respondent's contention that the existence and continuance of total and permanent disability were not shown by "*undisputed*" evidence upon the trial, and that certain letters quoted in Re-

spondent's brief "*dispute* the testimony introduced by Petitioners tending to show that the insured was totally and permanently disabled", the Petitioners make reply that it was not necessary for the Petitioners to prove such disability by "*undisputed*" evidence, where, as in this case, each of the adverse parties unconditionally requested the trial court for a directed verdict in his favor (Record 52), thereby withdrawing the case from the jury and making the judge the trier of the facts, and where, as in this case, there was "substantial" evidence to support the judgment rendered thereon by the trial court in favor of Petitioners. *Williams* v. *Vreeland,* 250 U. S. 295. The honorable Circuit Court seems to have overlooked the fact that the Respondent also requested a peremptory instruction (Record 199). That there was "substantial" testimony showing the existence and continuance of the total and permanent disability, and therefore "sufficient" evidence, though "denied" or "disputed" in the trial court, cannot be questioned now, especially so when not questioned by Respondent on appeal to the Circuit Court. Indeed, the testimony of fourteen (14) witnesses (Record 66-128), three of them local physicians and one of them a surgeon in the National Home for Disabled Volunteer Soldiers (Record 93-94), introduced by Petitioners to prove that insured was totally disabled from the due date of his last premium to the date of his death, with no witness offered by Respondent to testify to the contrary, is "sufficient" evidence that the insured was totally and permanently disabled during the period in question, where such evidence shows insured "*substantiallly unable,* in the

exercise of *ordinary care,*" to perform his duties or "usual tasks", even if "fortunate enough to earn *something* though out of all proportion to what he had previously earned". *Commonwealth Ins. Co.* v. *Bryant,* 240 S. W. 893 (Texas Supreme); *Federal Supply Co.* v. *Scott,* 22 S. W. (2) 160; *Great Southern Life Ins. Co.* v. *Johnson,* 25 S. W. (2) 1097; *Metropolitan Life Ins. Co.* v. *Bovello,* 12 Fed. (2) 81 (District of Columbia Court of Appeals). Besides, if Respondent still claims it did "question" the sufficiency of such evidence upon appeal, which Petitioners respectfully challenge the Respondent did, it cannot be successfully claimed the Circuit Court reversed the judgment of the trial court upon such ground. Whether or not "proof" of such disability was furnished to the company, whether it had to be in writing, and, if so, sworn to, whether it had to be furnished at all where the company was fully informed of the facts constituting such disability, whether it had to be furnished as a "condition precedent" to liability, or "within a reasonable time", and whether the company declared the policy forfeited before such reasonable time expired, are different questions. Whatever contrary view Respondent may assert concerning the correctness of Petitioners' statement of the holding of the Circuit Court upon that part of the policy the Circuit Court says is "called" the "Income Disability Clause", which covers more than a page and includes the provision for making "claim for benefits" (Record 196), Petitioners submit that, in the "Specification of Error", page 11 of their supporting brief, undertaking to assign as error the Circuit Court's construction of

said "Income Disability Clause", Petitioners did substantially charge, as concisely as they could, that said Circuit Court "*erred* in reversing the judgment of the trial court and in holding that *the clause requiring the furnishing of the proof and the making of claim for benefits* while policy was still in force and before default in payment of the premium, was a *'condition precedent to the insured becoming entitled to the stated total and permanent disability benefits'*, instead of the honorable Circuit Court of Appeals holding, as it should have held, that the insured was entitled to a reasonable time for *furnishing proof and making claim.*" (Page 11 supporting brief.)

II.

Petitioners' Reply to Respondent's Contention that Insured Was Required, As Condition Precedent, to Make "Claim For Benefits" As Well As Furnish "Proof of Disability."

In addition to argument and authorities contained in their petition and supporting brief, Petitioners say that, while the "Income Disability Clause" provides for furnishing "proof of disability", there is nothing in the policy, as the Petitioners view it, *requiring* insured to make "claim for benefits". If the "Income Disability Clause" were to be construed like Respondent claims it should be, it would have to be reconstructed so as to read in part as follows: "Upon receipt of satisfactory proof *and claim for benefits*, as hereinafter defined, the company will," etc. But the clause does not so read. It does not make the requirement with reference to making "claim for benefits".

That such requirement *could* have been made is not denied; and, if made, whether to be construed as a condition precedent, is not the question now. The question now is: Did the policy make such *requirement*, that is, the requirement that the "claim for benefits" be made with the "proof of disability" before failure to pay any premium, in order to keep the policy in force during disability. The only provision in the "Income Disability Clause" that makes reference to the matter of claiming benefits is a subsequent provision to the effect that the "policy *at the time* of making claim for such benefits must be in full force," etc. (Record 33). Certainly a claim for benefits—"death benefits" as well as "disability benefits" or any other benefits—must be based upon a policy in force, full force, when the claim for benefits is made. The "Income Disability Clause", naturally, contemplates that the policy shall be kept in force by payment of premiums—that is, by the insured if the *insured* is physically able to work, and by the *company* if the insured is not physically able to work. The provision, that the policy "must be in force" at the time the claim for benefits is made, implies that the policy has already been put in force and kept in force by some prior act or condition, such as by payment of premium or existence of disability excusing payment, and negatives the idea it is put in force by making claim for benefits thereunder. The question just here is not whether a claim was ever made during disability and before failure to pay premium, but whether the policy was in force when the claim was made. If the condition was such as that the policy was continued in force

during the alleged period of disability, and insured made his proof during such period, or was excused from making such proof by reason of the company's alleged notification during such period, and before a reasonable time for making the proof had expired, that the policy had lapsed and could not be reinstated except upon certificate of good health, which the company knew could not be furnished (Record 120-122), the policy was not forfeited under the subsequent provision relied on by Respondent to the effect the "policy at the time of making claim for such benefits must be in full force," etc. Therefore, without waiving the claim that the evidence shows Respondent was repeatedly furnished with satisfactory proof of total and permanent disability before failure to pay any premium, proof that should be sufficient to satisfy any reasonable mind (R. 98, 102, 105, 109, 110, 111, 112, 114, 116, 117, 120, 148, 150, 151), it is respectfully submitted that the Respondent is wrong in its contention that the "Income Disability Clause" required the insured, as a condition precedent to continued protection, to make *both* "proof of disability" and "claim for benefits" before there was a failure to pay premium. But if it be conceded that Respondent is not wrong in contending that the "Income Disability Clause" *requires* the making of *both* "proof of disability" and "claim for benefits" before there is a failure to pay any premium, the Petitioners answer that if they are correct in the contention that the "proof of disability" clause is *too harsh* to be enforced as a condition precedent, as demonstrated by the argument and authorities presented in Petitioners' petition and supporting brief,

upon which this Court acted in granting the writ of certiorari in this case, then the "claim for benefits" clause must, for the same reason, receive a like construction. Each clause is a harsh clause, and neither can justify the other. Adding one harsh clause to another harsh clause does not relieve the harshness.

Attention is called to the fact that in the "Income Disability Clause" is a provision "that, notwithstanding proof of disability may have been accepted by the company as satisfactory, the insured shall at any time, on demand, furnish the company satisfactory proof of the continuance of such disability," etc. (Record 34). Please notice that there are two provisions in the same "Income Disability Clause" with reference to furnishing "satisfactory proof," the latter proof to be furnished "on demand" showing "continuance of such disability." When it comes to a construction of such words and provisions in the clause, does the Respondent contend that the insured would not have a reasonable time in which to furnish such proof, and if not what reason is there for difference in construction? If insured is entitled to a reasonable time in one instance, then why not in the other? The instance serves to prove that words and phrases must be given a liberal and reasonable construction. The Texas court decisions cited above show that insurance companies insist on a literal interpretation and application of such words as "total" and "permanent." Respondent is doing that very thing now. Respondent's own language in the same "Income Disability Clause" recognizes that the words "total" and "permanent" are

not rigid in their meaning, because said clause in effect provides that the benefits shall cease when the "permanent" disability ceases to be "permanent" (Record 34). Unquestionably an insurance company writing its own forms of insurance can include condition precedent clauses that are narrow, unreasonable, difficult and sometimes impossible to perform, but they will not be upheld in law if their enforcement tends to defeat the purpose for which they were written, says Mr. Cooley in his work on Insurance, 1st Ed. 3462, and 2nd Ed., Vol. 7, page 5918. And on that point this Court has already held:

> "It is said that compliance with this provision, even though impossible, was a condition precedent to securing the insurance. But narrow and unreasonable interpretations of clauses in an insurance policy are not favored."—Stipcich *vs.* Metropolitan Life Ins. Co., 277 U. S. 311.

Therefore, Petitioners submit that, in accordance with the argument and authorities presented in their petition and supporting brief, here referred to for sake of avoiding repetition, the writ of certiorari was not improvidently granted, and that under the rule that harsh clauses like those in question cannot be construed as creating conditions precedent, the judgment of the honorable Circuit Court of Appeals should be reversed and the judgment of the trial court affirmed.

III.

Petitioners' Reply to Respondent's Contention Statute Allowing Penalty and Attorney's Fees Unconstitutional.

In answer to Respondent's contention Texas statute allowing recovery penalty and attorney's fees in suit upon policy, Petitioners make reply that the Texas statute is applicable, because Petitioners alleged and proved policy delivered in Texas (Record 14, 15, 24, 32, 34, 129, 132, 167), and therefore governed by the Texas statute which says that such policies shall be so governed. Art. 5054; *Ætna Life Ins. Co.* v. *Dunken,* 266 U. S. 389; *Equitable Life Assurance Society* v. *Pettus,* 140 U. S. 226.

Respectfully submitted,

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